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No. 01-983

IN THE

SUPREME COURT OF THE UNITED STATES

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, NATIONAL WRITERS UNION and THE ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests. Since its founding in 1970, the Reporters Committee has provided representation, information, legal

[1] This brief is filed with the written consent of Petitioner and Respondent. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the *amici* represented herein, its members, or counsel, make a monetary contribution to the preparation or submission of this brief.

guidance, and research in press freedom cases, including cases involving the qualified journalist's privilege against compelled disclosure of unpublished material, and particularly material related to confidential sources.

Founded in 1948, the American Society of Journalists and Authors ("ASJA") is the oldest freelance writers' association in the United States. The Society's over 1000 members are independent, nonfiction writers of books and journalism who have met ASJA's exacting standards of professional achievement.

National Writers Union ("NWU") is the only labor union to represent freelance writers in US markets. The union currently has more than 7000 members.

The Association of Alternative Newsweeklies ("AAN") is a not-for-profit trade association for 121 alternative newspapers in North America. Member publications have a total weekly circulation of more than 7 million and a reach of 20 million readers.

The Reporters Committee, ASJA, NWU, and AAN (collectively, "Amici") adopt the arguments contained in Vanessa Leggett's Petition for Writ of Certiorari to this Court. Amici write separately to emphasize the constitutional considerations and public policy rationales supporting recognition of a First Amendment qualified privilege afforded members of the press against compelled disclosure of confidential sources and material in both civil and criminal proceedings.

SUMMARY OF ARGUMENT

This brief is directed to the protections afforded journalists and members of the press under the First Amendment to the U.S. Constitution to resist compelled production of confidential source information and mater-

ial in response to a federal grand jury subpoena. This Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) provided the foundation for nearly three decades of lower court decisions recognizing this protection, either in the form of an explicit qualified privilege or otherwise, in both civil and criminal proceedings. However, there is now conflict among the federal circuit courts over the existence, nature, and scope of constitutional protection against compelled disclosure of confidential sources and information.

It is the public's "right to know" that is at the center of this important debate over First Amendment protections. Both constitutional and strong public policy rationales support such protections, which exist to promote the free flow of information to the public and not the personal interest of individual journalists or the press in general.

ARGUMENT

I.

THE U.S. CONSTITUTION REQUIRES PROTECTION AGAINST THE COMPELLED DISCLOSURE OF CONFIDENTIAL NEWSGATHERING SOURCES AND MATERIALS IN RESPONSE TO A GRAND JURY SUBPOENA

This case concerns an important matter of public interest, namely the ability of members of the press to protect confidential sources. By clarifying the existence and parameters of this protection, this Court will ensure that journalists nationwide receive the uniform support necessary to carry out their constitutionally protected newsgathering and reporting activities. Absent this protection, the press will be subject to varying levels of treatment depending on the jurisdiction in which they work – in some jurisdictions, including the Fifth Circuit, journalists

will be reduced to an investigative arm of prosecutors, police, criminal defendants, and civil litigants, resulting in a severe chilling of the flow of information to the public.

This Court recognized the constitutional dimension of this public interest in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), stating that the newsgathering and editorial processes are entitled to protection under the First Amendment: "Without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. While this Court rejected an absolute privilege in holding that the reporters in *Branzburg* could be compelled to reveal sources to a grand jury on the facts presented, this Court also stated that "news gathering is not without its First Amendment protections . . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 707-08. Justice Powell, in a pivotal concurring opinion, made clear that the majority was not rejecting a qualified privilege:

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. [. . .] Indeed, *if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement,* he will have access to the Court on a motion to quash and an appropriate protective order may be issued. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citi-

zens to give relevant testimony with respect to criminal conduct.[2]

Whether the First Amendment's protections of newsgathering activity rise to the level of a qualified privilege, and whether such a privilege is properly attributable to *Branzburg*, has been the subject of much debate. Lower federal courts have struggled to reconcile *Branzburg*'s rejection of an absolute privilege with its enunciation of constitutional protections afforded the press. There is now recognition in a majority of federal circuits that journalists possess a First Amendment qualified privilege against compelled disclosure of their newsgathering activities under *Branzburg*,[3] while a minority of circuits have either declined to recognize the privilege or have so weakened it that it has become virtually nonexistent.[4] Whether characterized as a privilege or as some other form of constitutional protection, a three-part test has emerged to assess the legitimacy of a government sub-

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[2] *Id.* at 709-10 (Powell, J., concurring) (emphasis added).

[3] *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (qualified privilege protects disclosure of unpublished information in criminal cases); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.) (same), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (qualified privilege protects confidential sources and unpublished information in criminal cases), *cert. denied*, 449 U.S. 1126 (1981); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) (qualified privilege protects confidential sources in criminal cases), *cert. denied*, 427 U.S. 912 (1976); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (qualified privilege protects unpublished information in criminal cases), *cert. denied*, 483 U.S. 1021 (1987).

[4] *See, e.g., Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1049-50 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987).

poena seeking confidential source information or material. The government must show that the information sought is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3) not obtainable from other sources. *See Branzburg*, 408 U.S. at 725; *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980); *see also United States v. Burke*, 700 F.2d 70, 77 (2nd Cir.), *cert. denied*, 464 U.S. 816 (1983).

Courts that have relied upon Justice Powell's balancing test, instead of rigidly rejecting the existence of any constitutional protection, continue to emphasize the policy consequences of denying protection. As the Third Circuit held in *United States v. Cuthbertson* with reference to unpublished materials:

> The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. Therefore, we hold that the privilege extends to unpublished materials in the possession of CBS.

Cuthbertson, 630 F.2d 139, 147 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

Similarly, the Ninth Circuit in *Shoen v. Shoen*, which also addressed a subpoena to a book author as here, held that news organizations should be free from:

> the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool

> of government or of a private party; the disincentive to compile and preserve nonbroadcast material; and the burden on journalists's time and resources in responding to subpoenas.

Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (quoting *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988)).[5] In *Shoen v. Shoen*, 3 F.3d 412, 414 (9th Cir. 1995), (*Shoen II*) the Ninth Circuit reiterated that "all but one of the federal circuits to address the issue have interpreted *Branzburg* . . . as establishing a qualified privilege for journalists against compelled disclosure of information gathered in the course of their work." The Court went on to set out a balancing test in determining whether the privilege had been overcome, following Justice Powell's opinion in *Branzburg*.

The Second and Fourth Circuits have also embraced constitutional protection in the form of a qualified journalist privilege. The Fourth Circuit in *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000) recently held that a sealing order was invalid because the assertion of a journalists's privilege, and subsequent finding of civil contempt, were not based on a showing that a three-part test established to overcome the privilege had been satisfied. *See id.* at 287-88 (citing *Miller*, 621 F.2d at 726). In reaching this holding, the Fourth Circuit made clear that the journalist's privilege is grounded in the First

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[5]The *Shoen* Court further concluded, in holding that a reporter's newsgathering activities were entitled to protection regardless of whether there had been a promise of confidentiality, that the "body of circuit case law and scholarly authority [is] so persuasive that we think it unnecessary to discuss the question further." *Shoen*, 5 F.3d at 1295. "[W]hen facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play." *Id.* at 1292.

Amendment as "recognized by the Supreme Court in *Pell* [*Pell v. Procunier*, 417 U.S. 817, 834 (1974)] and *Branzburg*." *Id.* at 287.

In *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2nd Cir.), *cert. denied*, 481 U.S. 1015 (1987), the Second Circuit stated that "the process of newsgathering is a protected right under the First Amendment, albeit a qualified one." The Court noted that this privilege was recognized in *Branzburg*, which only rejected an absolute privilege afforded a journalist, not a qualified privilege. *Id.* The *von Bulow* decision also establishes that a book author, who has "obtained the information [sought] in the course of gathering news for publication," satisfies the definition of "journalist" for purposes of invoking the privilege. *Id.* at 143-44; *see also id.* at 144 (test looks to the "intent to use material – sought, gathered, or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

Nine circuits have now interpreted *Branzburg* as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.[6] Eight federal circuits have held that the qualified privilege applies to journalists faced with a subpoena seeking

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[6] *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2nd Cir. 1982); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

discovery of confidential sources.[7] Instead of a blanket rejection of the qualified privilege in grand jury proceedings as adopted by the Fifth Circuit below, this Court should acknowledge the vital public interests at stake and require that lower courts balance the competing interests accordingly, as Justice Powell urged and as adopted by the majority of circuits, whether an explicit privilege is recognized or not.

II.

THE FIFTH CIRCUIT UNCONSTITUTIONALLY ABROGATED THE QUALIFIED PRIVILEGE IN CRIMINAL AND GRAND JURY PROCEEDINGS

The Fifth Circuit has followed the majority of jurisdictions in recognizing First Amendment protection, in the form of a qualified privilege or otherwise, against compulsory disclosure of confidential sources in civil proceedings. *See, e.g., In re Selcraig,* 705 F.2d 789 (5th Cir. 1983); *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583 (1st Cir. 1980); *United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied,* 482 U.S. 917 (1987). As the Fifth Circuit stated in *In re Selcraig*: "We have recognized that the First Amendment shields a reporter from being required to disclose

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[7] *See Clyburn v. New World Communications, Inc.,* 903 F.2d 29 (D.C. Cir. 1990); *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir. 1988); *LaRouche v. National Broadcasting Co.,* 780 F.2d 1134 (4th Cir. 1986), *cert. denied,* 479 U.S. 818 (1986); *United States v. Burke,* 700 F.2d 70 (2nd Cir. 1983), *cert. denied,* 464 U.S. 816 (1983); *United States v. Cuthbertson,* 630 F.2d 139 (3d Cir. 1980), *cert. denied,* 449 U.S. 1126 (1981); *Miller v. Trans-American Press, Inc.,* 621 F.2d 721 (5th Cir.), *modified on rehearing,* 628 F.2d 932 (1980), *cert. denied,* 450 U.S. 1041 (1981); See *Shoen v. Shoen,* 5 F.3d at 1292 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433 (10th Cir. 1977).

the identity of persons who have imparted information to him in confidence." *In re Selcraig*, 705 F.2d at 792 (citing *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). The Fifth Circuit went on to state that "[o]ur course was dictated by our careful reading of the plurality and concurring opinions in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)." *Id.*

However, the Fifth Circuit has all but abandoned this constitutional protection in criminal proceedings. In 1998, the Fifth Circuit decided *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), holding that there is no protection or privilege under the First Amendment to refuse to disclose nonconfidential information in response to a subpoena in a criminal proceeding. *Id.* at 972. Technically, the *Smith* decision did not reject the qualified privilege with respect to confidential sources and material since *Smith* only involved "on the record," nonconfidential sources. *Id.* at 971-72 (noting that both "*Miller* and *Selcraig* recognized privileges meant to protect newsreporters from unnecessarily revealing the identities of confidential sources."). Nevertheless, *Smith* laid the groundwork for the Fifth Circuit to abrogate the qualified privilege in grand jury proceedings in the case below.

The Fifth Circuit in this appeal made two noteworthy errors in holding that no constitutional protection applies to journalists faced with a grand jury subpoena. First, the court stated that "no circuit court has recognized a qualified testimonial privilege in the context of a criminal grand jury." (Slip op., at p. 8). However, the Third Circuit affirmed the decision in *In re Williams* that a quali-

fied First Amendment reporter's privilege prohibited compelled disclosure of confidential sources in the context of a grand jury.[8] Second, relying solely on *Smith*, the Fifth Circuit below held that the journalists's privilege is "ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." (Slip op., at p. 6). The Fifth Circuit's interpretation of *Branzburg* essentially denies any First Amendment protection whatsoever in the criminal and grand jury context, since all that is left is the "harassment" standard codified for the protection of all witnesses by Fed. R. Crim. P. 17(c). The Fifth Circuit failed to properly analyze the purpose of the privilege, which is not to serve as a personal testimonial privilege benefiting a special class of witness, but to protect the public's "right to know" under the First Amendment. While journalists are necessarily the individuals who must assert the privilege, the protection against compusory disclosure accrues to the benefit of the confidential source, and more generally to the public as a whole. By misconceiving the purpose of the privilege, the Fifth Circuit was left with the easier decision of rejecting a personal testimonial privilege, which was not the issue presented. Thus, the Fifth Circuit perpetuated the error made in *Smith* of viewing the privilege or balancing test as benefiting journalists as a class of witness instead of the public's right to know under the First Amendment.

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[8] *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (quashing grand jury subpoena seeking confidential information); *see also In re Grand Jury* 95-1, 59 F.Supp.2d 1 (D.D.C. 1996) (implicitly recognizing First Amendment protection in grand jury context for confidential information, but explicitly rejecting a reporter's privilege for nonconfidential information).

A disturbing distinction drawn by the Fifth Circuit and other circuits is the availability of the privilege in civil but not criminal proceedings, where the balancing of interests "is entirely inapplicable." (Slip op., at pp. 7-8). Yet, no other testimonial privilege depends for its existence on the nature of the case in which the testimony is deemed relevant. Indeed, it makes little sense to condition the availability of a testimonial privilege on the type of case in which a subpoena is issued – journalists, and more importantly their potential sources, are left uncertain as to whether any protection will ultimately be afforded. The more logical approach is to apply the balancing test, even if more weight is accorded either the governmental interest or the defendant's fair trial rights, not to abandon the balancing test altogether.

Justice Powell's concurrence in *Branzburg* supports a case-by-case approach that balances the interests regardless of the forum in which the privilege is asserted:

> The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

Branzburg, 408 U.S. at 710 (Powell, J., concurring). It is important to note that Justice Powell in *Branzburg* advocated a case-by-case balancing test in the context of grand jury proceedings as presented here, not just criminal or civil proceedings. Justice Powell was correct not to distinguish between forums because there is no legitimate rationale for distinguishing between criminal, grand jury, and civil proceedings for purposes of applying con-

stitutional protections. This Court should grant certiorari in this case to clarify the application of the qualified privilege or balancing test in all forums and proceedings in which the press is subpoenaed to produce confidential information or identify confidential sources.

III.
STRONG PUBLIC POLICY RATIONALES SUPPORT RECOGNITION OF A QUALIFIED JOURNALIST PRIVILEGE WITH RESPECT TO CONFIDENIAL SOURCES AND INFORMATION

The public policy supporting recognition of constitutional protection against compelled disclosure of confidential information and sources is significant. An independent press provides information the public needs to make important decisions about the functioning of public and private institutions. In response to this need, broadcasters and publishers produce scores of news stories each day. By their very nature, the events that are of interest to the public and therefore newsworthy – actions of government officials, crime, fires, accidents, and natural disasters – often result in civil and criminal litigation. The job of the press makes it particularly vulnerable to subpoenas issued by the government to gather information, which adversely affects the free flow of information to the public.

With respect to confidential sources, otherwise publicly unavailable information is often conveyed to journalists under a promise of confidentiality. If no qualified privilege exists to protect this promise of confidentiality, important information that should be made public will stay buried. If a reporter reveals a confidential source, he may be liable in damages to the source for breaking his

promise of confidentiality.[9] If a source knows that his identity will not be protected, there is no incentive to provide the information, thus cutting off the flow of information to the public. This self-evident fact underscores how the Fifth Circuit, relying on *Smith*, erred by misperceiving the basis for the privilege as somehow protecting a special class of witness.

In light of these essential and unique functions of the press, which distinguish the press from other private citizens, failure to recognize a journalist's privilege applicable to confidential information will have profound consequences. Abrogation of the privilege would result in severe adverse results contrary to the public interest: (1) the free flow of information to the public will be hampered as confidential informants come to understand that their identity and information will not be protected; (2) the public will begin to think of journalists as investigators for the government and private litigants, as opposed to independent newsgatherers serving the public interest; (3) the press will be burdened by an overwhelming number of requests for assistance by litigators in civil and criminal cases; and (4) journalists will curtain their research if they are required to serve as evidence collectors in addition to their traditional role as people who gather and disseminate news and information.

The nature of the proceeding in which the subpoena is issued should not be determinative of the existence of constitutional protection. The very same constitutional and public policy concerns regarding a free press are

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[9] *See Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding a reporter liable for breaking promise of confidentiality to a source).

present in the context of criminal proceedings, including grand juries, as in civil litigation. Even assuming that the interests of the government or criminal defendant may be heightened in criminal or grand jury proceedings, it is not a difference in kind but a matter of degree. The public interest in a free press, and the constitutional dimensions of press activity, remain unchanged.[10]

The constitutional considerations at issue are weighty, and the public policy rationales for recognizing a journalist's qualified privilege are significant and real. This Court should take this opportunity to confirm the existence of the qualified journalist privilege to prevent the compelled disclosure of confidential source information and material in response to a grand jury's subpoena absent the application of a balancing test on a case-by-case basis. This Court should reiterate the three-prong test set forth in Justice Powell's concurring opinion in *Branzburg*, refined and utilized by many lower federal circuit courts, to determine if the government has met its burden to pierce the qualified privilege. The government must show that the information sought is (1) highly

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[10]The U.S. Justice Department recognizes that newsgathering is essential to preserving a free press, as evidenced by its internal policy and procedures for issuing subpoenas to the press implemented by the Nixon Administration's Justice Department in 1973. *See* 28 C.F.R. 50.10 (2000) (Attorney General's "Policy with regard to the issuance of subpoenas to or filing of criminal charges against members of the news media"). The Justice Department requires that a U.S. Attorney obtain authorization from the Attorney General before serving subpoenas on members of the press. *Id.* § 50.10; *see also id.* § 50.10(f)(2), (f)(3) (requiring that federal authorities demonstrate that any information sought – not just confidential source information – is "essential to the successful completion of the litigation in a case of substantial importance," and cannot be obtained from "alternative nonmedia sources").

material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3) not obtainable from other sources. *See Branzburg*, 408 U.S. at 725; *Miller*, 621 F.2d at 726; *see also United States v. Burke*, 700 F.2d 70, 77 (2nd Cir.), *cert. denied*, 464 U.S. 816 (1983). The party seeking disclosure of a confidential informant's identity bears the burden of proving by substantial evidence that these three requirements have been met. *Miller*, 621 F.2d at 726. When the government has not made this showing, courts should be more willing to accept the argument that the government is either using its subpoena powers to harass the press, a danger recognized by this Court in *Branzburg*, 408 U.S. 710, or simply abrogating its own duty to investigate criminal activity.

The mission of the press to inform the public will certainly suffer without the protection offered by the qualified privilege, a result that Justice Powell cautioned against in his concurrence in *Branzburg*: "[w]e do not hold . . . that state and federal authorities are free to 'annex' the news media as an 'investigative arm of the government.' " *Branzburg*, 408 U.S. at 709 (Powell, J. concurring). The resulting harm is to the public, for whom a free press is designed to benefit. This Court is presented with an opportunity to minimize the harm inflicted on the public by recognizing the journalist's qualified privilege and clearly articulating its scope under the First Amendment.

CONCLUSION

Allowing unrestrained subpoenas for a journalist's work product in criminal and grand jury proceedings will seriously affect the vitality of the press. Reasonable journalists will fear that the use of similar sub-

poenas will allow prosecutors to use journalists as private investigators, thereby restricting the free flow of information to the public. Therefore, *amici curiae* urge this Court to explicitly recognize that the qualified journalist's privilege protects Petitioner Leggett's confidential sources and information, and that a balancing test should apply to determine whether compelled disclosure is appropriate.

Whether conceived as an explicit privilege or as a balancing test to further constitutional protections, the government must demonstrate that the specific, known information sought is highly relevant to the case, not merely duplicative or cumulative, and all reasonable alternate sources of the information have been exhausted. Otherwise, the presumption should be that the government is infringing on the protections afforded the press, and the public, under the First Amendment.

Respectfully submitted,

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